

STATE OF MICHIGAN  
COURT OF APPEALS

---

ALLIED MECHANICAL SERVICES, INC.,

Plaintiff-Appellee,

v

DR&W ENGINEERING & DESIGN, INC., d/b/a  
DR&W ENGINEERING & DESIGN, STEVEN  
D. RADEMAKER, CHARLES A. WAHL, and  
TIMOTHY B. DALY,

Defendants-Appellants.

---

UNPUBLISHED

March 22, 2007

No. 266165

Ottawa Circuit Court

LC No. 03-047725-CK

Before: O’Connell, P.J., and Murray and Davis, JJ.

MURRAY, J. (*concurring*).

I concur in the lead opinion’s affirmance of the judgment entered on behalf of plaintiff after a bench trial. However, I write separately on the issue of the individual defendant’s liability under the Builder’s Trust Fund Act, MCL 570.151 et. seq. In my view, the act does not provide a cause of action against an individual, or for that matter, any private cause of action, but because precedent holds that it does, I must concur in the conclusion that the individual defendants are subject to liability under the act.

As we noted in *DiPonio Co v Rosati Co*, 246 Mich App 43, 48; 631 NW2d 59 (2001), the “Builders’ [T]rust [F]und [A]ct is a penal statute that does not expressly provide a civil cause of action. However, our Supreme Court has long recognized a civil cause of action for violation of the provisions of the act,” citing *BF Farnell Co v Monahan*, 377 Mich 552, 555; 141 NW2d 58 (1966), *In re Certified Question*, 411 Mich 727, 732; 311 NW2d 731 (1981) and *National Bank of Detroit v Eames and Brown*, 396 Mich 611, 620-621; 242 NW2d 412 (1976). Nevertheless, there is no language within any of the three sections of this act that provides a civil cause of action for violation of the act. Thus, because the act does not expressly create a private cause of action, “the claim is precluded if the [Act] provides an adequate means of enforcing its provisions.” *Lowell R Fisher v WA Foote Memorial Hosp*, 261 Mich App 727, 730; 683 NW2d 248 (2004), lv granted 471 Mich 957; 691 NW2d 453, vacated and leave denied, 473 Mich 888; 703 NW2d 434 (2005). Here, the act provides a remedy for when a contractor violates the act. Specifically, section 2 provides that a violation of the act results in a felony which is punishable by a fine of not less than \$100 nor more than \$5,000 and/or imprisonment from six months to three years. When a statute contains criminal penalties for violations of its provisions, it is an

adequate means of enforcement of its provisions. *Lane v KinderCare Learning Centers, Inc*, 231 Mich App 689, 695-696; 588 NW2d 715 (1998).

In my view, if we were writing on a clean slate, I would hold that the individual defendants are not liable as a matter of law because plaintiffs would not have a private cause of action against them. However, as noted by the *DiPonio Construction Co.* Court, we are not writing on a clean slate. I therefore concur in the affirmance of the trial court's decision.

/s/ Christopher M. Murray